STATE OF MAINE
CONNECTME AUTHORITY

October 18, 2006

CONNECTME AUTHORITY
ConnectME Authority Operation
(Chapter 101)

COMMENTS OF THE TELEPHONE ASSOCIATION OF MAINE

The Telephone Association of Maine (TAM) is a trade organization comprised of all 22 independent incumbent local exchange carriers in the State. TAM worked extensively with other parties and the Governor's office in helping to draft the ConnectME legislation that was enacted as P.L. 2006 Chapter 665. TAM offers the following comments and amendments to the proposed Rule implementing the ConnectME statute.

As a preliminary matter, TAM believes it is essential to recall why the ConnectME legislation was not initially funded by the legislature and why the Rulemaking was designated Major Substantive. The Joint Standing Committee on Utilities and Energy (U&E Committee) deliberated the ConnectME legislation extensively and determined that while the ultimate goal was one that all members could support, there were questions as to how the goal would be accomplished. Many members of the U&E Committee were concerned that the ConnectME Authority lacked a "business plan" and a means of ensuring that funding would be appropriately utilized in a manner that would minimize the increased taxation on ratepayers for communications services throughout the State. Accordingly, the legislation was enacted with the provision that funding would be withheld until the Authority came back with a Rule detailing how the Authority would utilize funding. By making the Rule a Major Substantive one, the U&E Committee reserved for itself the ability to determine whether or not the business plan developed by the Authority was one that should be funded through a tax on ratepayers. The task of the Authority in developing the Rule is to develop a workable business plan that includes specific and concrete frameworks for enhancing advanced communications infrastructure in Maine in a manner that is efficient, effective, and has a minimal impact

on ratepayers. TAM does not believe that the proposed Rule in its present form addresses the concerns and criteria of the legislature.

The proposed Rule as written materially deviates from the intent and, in some instances, the wording of the legislation as evidenced by the plain language of the statute itself. The most efficient way to address these deviations is through a section-by-section analysis.

Section 1. Purpose

TAM believes that this section of the Rule should more closely follow the actual language of the legislation. For many of the subsections, the language is taken directly from the statute. It is unclear why the proposed Rule includes language that does not exist in the statute, and alternately why the proposed Rule omits portions of §9204. TAM would suggest that the final Rule should directly reference the sections of the statute that are being cited for each of the subsections under Section 1 of the Rule. Therefore, for example, Section 1(1) of the Rule should indicate that the criteria directive is pursuant to §9204(1).

Additionally, deviations or omissions from the provisions of the Statute should be corrected. In Section 1(3) of the Rule, the drafters indicated that a purpose was to "Monitor wireless (cellular) coverage". This is a material change from the statute in two ways. The first is the parenthetical inclusion of the word cellular. At the work session on L.D. 2080, which eventually became the ConnectME law, representatives from the wireless industry informed the U&E Committee that the term "cellular" was inappropriate for use as it only refers to one type of commercial mobile radio service (CMRS) that is not used by all carriers. The U&E Committee accepted the representations of the wireless industry and amended the language of the statute to eliminate reference to "cellular" service. For the drafters of the Rule to include that phrase again introduces confusion and potentially limits the scope of the application of the Rule in a manner that is inconsistent with the intent and letter of the law. This

subsection is also a material alteration from the statute in that the statute states that a duty of the Authority is to "monitor wireless coverage in areas where the authority determines the quality of coverage is inadequate." Subsection 1(3) omits the Legislature's language specifying that monitoring of wireless service is only to occur where the Authority determines the quality of coverage is inadequate. The best way to repair both of these material alterations is to simply replace Subsection 1(3) of the Rule with the language of §9204(2)(A).

Finally, there is an inexplicable omission in the list of duties listed in Section 1 of the Rule. Under §9204(2)(f) the duties of the Authority include the duty to "Cover reasonable administrative costs of the authority." It is TAM's understanding, based on the presentation before the Authority on September 21, 2006, that members of the Public Utilities Commission Staff assisted in the development of the Rules, and indeed facilitated the "walk through" of the proposed Rule with the members of the Authority. While TAM believes that it is entirely reasonable for Agencies with particular expertise to assist other State bodies, it is important to remember that the PUC is not a General Fund supported Agency, but rather an Agency supported by assessments on ratepayers of all utility services.[1] Accordingly, it is important to ensure that when funding is available to the Authority, such funding is used to repay the Commission and any other State Agencies for their Staff time used in assisting the Authority administratively, including with this Rulemaking process. To ensure that this support takes place, the list of duties in Section 1 of the Rule should explicitly include §9204(2)(f).

Section 2. Definitions

TAM would like to address two issues regarding this Section. The first relates to the definition of "Certificate of Qualification". The definition currently refers to Section

[1] A representative from the Maine Revenue Service (MRS) also conducted a "walk through" of language of a Rule connected to the Authority. However, as noted in a colloquy between Mr. Thompson and the representative for MRS, the MRS Rule was one being undertaken based on a statutory mandate to MRS directly and was not being undertaken under the auspices of the Authority. Accordingly, all time spent by the MRS representative in drafting and discussing the Rule with the Authority was within his duties as an employee of MRS and therefore there would be no need for the Authority to support administrative costs associated with developing the MRS Rule.

3 of (presumably, as some text appears to have been omitted) the Rules developed by the Maine Revenue Service. It would not seem to be wise to place in a Rule a definition that can be materially altered by a change in a Rule that is under the direction of an entirely separate Agency, which serves different purposes, without any opportunity for the Authority to review whether the change made by the other Agency should be reflected in the Authority's Rule. While TAM has no objections to the procedures for obtaining a Certificate of Qualification as set forth by the proposed Rule of the MRS, perhaps the Authority Rule should define the Certificate without reference to the MRS Rule.

The more substantive issue in this Section is the fact that the drafters of the Rule have materially altered the language of the statute in an attempt to "clarify" the intent of the statute. The problem is that the "clarification" is actually an amendment. The legislation itself defines Communications Service as follows:

> "Communications service means any wireline voice, satellite, data, fixed wireless data or video retail service." 35-A MRSA §9202(3)

The Rule attempts to redefine Communications Service as follows:

> "Communications Service means any retail wireline voice, wireline data, fixed wireless data, satellite data, or any video retail service."

Reading the plain language of the statute, all satellite and all data retail services are included in the definition of Communications Service. The proposed Rule limits satellite service to satellite data service, and limits data service to wireline data service. This limitation on the language of the statute is beyond the scope of the Rulemaking ability of the Authority. The Authority is bound by the definitions adopted by the Legislature in the Authority's enabling legislation. As the Maine Law Court once again reiterated as recently as April 26, 2006, "The cardinal rule of statutory construction is that when the words of the Legislature are clear, they are to be given their plain meaning and further

judicial interpretation is not necessary." *Schwartz v. Unemployment Insurance Commission,* 2006 ME 41, P15; 2006 Lexis 41, 11; 895 A.2d 965 (Me. 2006) (quoting *Bureau of Employee Relations v. Me. Labor Relations Bd*., 611 A.2d 59, 61 (Me. 1992)). Under the clear legal doctrine described by the Law Court, the Authority is barred from second guessing the plain language of the statute. Accordingly, the definition of Communications Service in the Rule must be replaced with the exact language used in §9202(3).

Section 3. Required Filing of Data

The information requested by the Authority under Section 3 of the proposed Rule is not always information that providers would maintain. Specifically, in Section 3(A)(3) the Authority requests "The target customers for each offering", "The total number of business customers", and "The total number of residential customers" for each service offered by Communications service providers. It is not always possible for companies to know whether a service is being used for business or residential purposes. For example, an individual may have a plowing business that they advertise on the internet but operate out of their home. They receive DSL service at their home, where it is used to download music through iTunes, play Xbox Live, connect with their local bank to conduct personal and business internet banking transactions, check both personal and business related emails, and maintain the website for the plowing business. Is this a business or residential customer? What classification of "target customer" would this subscriber be defined as? The whole point of bringing broadband service to rural communities is to promote small business opportunities, many of which are tied to home use services. Accordingly, when marketing and tracking this information, it is not as clean as who is the target customer, who takes residential service and who takes business service. Those terms are from a telephone regulatory model which is largely inapplicable to the realities of broadband service. The real distinction between residential users and business users is a question of scale. A purely residential home may well be content with 768 Kbps service, where a business user may require 3 Mbps. But these issues are of scope and how many subscribers are taking a form of service. Accordingly, TAM would suggest

retaining Sections 3(A)(3)(a),(b) and (d) but eliminating Subsections (c), (e) and (f). Moreover, TAM would suggest that all of this information be automatically deemed confidential, as discussed below.

Section 4. Protection of Confidential Information

TAM believes that this section is generally appropriate, but there is one change that should be made. The proposed Rule in Section 4(A)(2)(c) indicates that Form 477 data is automatically protected, and wireless data provided under Subsection 3(B) is automatically protected, but information under Subsection 3(A) is not protected. Information concerning the types of offerings and how successful the offerings are at a given rate is highly confidential information that should automatically be protected. Accordingly, TAM would propose that Subsection 4(2)(c)(i) be removed and Subsection 4(2)(c)(ii) be amended to read as follows:

"Information provided pursuant to Section 3"

This would continue the protection of confidential wireless company information as well as protecting the full scope of proprietary business information for the broadband providers.

Section 5. Designation of Broadband Service and Eligible Areas

TAM believes that Section 5(A)(4) is inappropriate. This section would eliminate the possibility of satellite service from being considered a broadband service without a further "affirmative finding" by the Authority that it meets the criteria set forth in Subsection 5(A). This is blatantly discriminatory against one class of service provider who could offer the very solutions sought by the legislature. One of the criteria established is Subsection 5(A)(1)(b): "Maximum Latency". TAM does not disagree that latency could be an issue, and believes that it is an appropriate criteria. Furthermore, this criteria may well exclude existing satellite data services from being considered eligible

broadband service under Section 5. However, it may well be that a month from now a satellite provider offers a service that has latency within the limits established by the Authority. It would be inappropriate and discriminatory to force the satellite provider to initiate a process with the Authority to obtain "an affirmative finding" that they meet the criteria. The delay and cost to the satellite provider to simply show that it meets the standards established by the Authority, when no other class of broadband provider is required to endure those same costs and delays, is inappropriate and should not be tolerated. Subsection 5(A)(4) should be eliminated from the Rule.

Subsection 5(C)(1) establishes the criteria for defining an "underserved" area for broadband purposes. While Subsection 5(C)(1)(a) establishes an objective standard for determining underserved, Subsection 5(C)(1)(b) provides a wholly subjective and speculative standard that is so vague as to amount to no standard at all. Without firm definitions of what constitutes adequate capacity, adequate reliability, adequate quality and what constitutes a "projected need" virtually any location could be deemed to be "underserved". This level of vagueness is what the legislature was seeking to avoid when it withheld funding for ConnectME until a business plan was developed in the form of a Rule. The standard of "we'll know it when we see it" is not a reasonable basis for taxing ratepayers for the purpose of funding projects to promote broadband usage in underserved areas. Moreover, there is no attempt to include the requirements of the statute, where the criteria include a determination as to whether declaring a location to be underserved would inhibit or impede private investment or diminish the value of prior private investment. In the Notice of Rulemaking the Authority essentially argues that it's too hard to establish criteria to determine whether private investment is impeded or inhibited or devalued. TAM disagrees. Accordingly, TAM proposes striking Section 5(C)(1) of the Rule and replacing it as follows:

1. <u>Broadband</u>. An area may only be designated as an underserved area for broadband service if:

a. The lowest cost broadband service that is available from any provider within the area is provided at a price that exceeds 150% of the statewide average for broadband service offered to residential end users on a stand-alone basis; and

b. No provider of broadband service within the area has invested in any infrastructure installed within the area for the provisioning of broadband service to residential customers within the past 12 months.

This will establish a criteria that addresses whether service is technically available but priced beyond the average consumer's ability to pay for the service while also ensuring that investment being made in a community is not inhibited by designation as an underserved area.

Section 6. ConnectME Authority Support

The most important piece of the Rule is the balance the Authority strikes between encouraging private investment and taxing ratepayers to subsidize rural broadband penetration. The proposed Rule has no defined cost-benefit analysis for how and when to support a project, nor does it have any processes in place that will ensure priority funding is given to communities with the greatest need. There is nothing in the proposed Rule that would prevent a single individual, presuming that they meet the proposed Rule's undefined category of "responsible entity", from applying to receive $500,000 from the Authority to obtain broadband service for 5 houses and receiving that funding. There is only language that discusses evaluation standards is that all proposals will be "evaluated concurrently". The proposed Rule falls far short of the goal of being a business plan, as expressly envisioned by the Joint Standing Committee on Utilities and Energy.

The proposed Rule is drafted in such a way that it creates disincentives for private investment and seeks to develop a program so unbounded as to require the highest taxation of ratepayers allowed under the statute in an attempt to subsidize the maximum

conceivable number of broadband expansion requests without regard for the underlying issues of take rates and stranded costs. As an example, Section 6(B) of the Rule indicates that, for parties applying for Authority funding, "Projects contained in approved proposals must be completed within one year of funding unless a waiver is granted by the Authority due to unique or unforeseen circumstances". However, in a similar circumstance where the Authority, as required by the statute, offers an opportunity to an existing broadband service provider to remedy the communications service shortfall within a year at no cost to the Authority, there is no waiver provision in the event there are unforeseen delays. Instead, there is language in the Notice of Rulemaking concerning how to penalize existing service providers for the exact same issues that funded applicants would be entitled to waivers, with specific requests for comments concerning:

> "What should the penalties be for not completing private investment within one year? What authority does the Authority have to impose penalties? Should the certification be with a surety or irrevocable letter of credit? Should the Authority determine that the company not completing the private investment within one year as ineligible for the sales and use tax reimbursement as provided in section 2017 of the Act and/or forfeit the ability to challenge other Authority projects?"

This unfortunate bias against the very carriers who have already brought broadband service to 85% of the State is a clear disincentive to private investment. Why would a business want to invest in any Maine community knowing that if it takes more than a year to complete a project, it will be subject to penalties levied by the Authority that was designed to promote advanced information service infrastructure deployment? The manner in which the proposed Rule is structured ensures that the majority of investment in broadband services as a result of this Authority's actions will be in the form of subsidies gathered through the taxation of communications service ratepayers throughout the State, most of whom are located within the 85% of the State that does have broadband access - a number which was, incidentally, reached through private investment, not Agency action.

The process established in the proposed Rule sets up a system without any guidelines or standards whereby governmental entities or communications service providers directly apply to the Authority for money. The application process is set for a specific timeline after which further applications will presumably not be accepted. The Authority then chooses a group of applications that it will fund, presumably using up the entire amount of funds collected through the .25% tax on all communications service providers. After having chosen its applicants, existing service providers within chosen application areas may choose to pre-empt the application by volunteering to install sufficient infrastructure in the selected application area. Moreover, Section 6(C) of the proposed Rule indicates that eligible activities for the fund include "implement[ing] new mobile communications service, or enhanc[ing] existing mobile communications service." This language is misleading in that wireless expansion is only allowed to be funded if a wireless provider has volunteered to pay into the ConnectME Fund, in which case funds may only be used in support of that specific wireless provider. At the very least, this information needs to be clarified when setting forth what "eligible activities" are. However, TAM believes that the only way to address the inadequacies of Section 6 of the proposed Rule is through a complete rewriting of the Section.

TAM's Amendment To Section 6.

TAM has attached to this filing a proposed Amendment which would replace Section 6 in its entirety. The proposed amendment seeks to promote private investment and ensure efficient use of ratepayer monies. In addition, it seeks to build a sustainable program that will limit stranded costs by promoting investment in those areas that have a demonstrated commitment to actually using the services once they are installed. Finally, it retains the goal of allowing for targeted projects to address unserved and underserved areas in a manner that allows funding from the Authority for specialized projects. It is probably easiest to understand the TAM amendment by working through each of the subsections.

Subsection A of TAM's amendment simply defines eligible areas with reference to Section 5 of the Rules.

Subsection B of TAM's amendment defines eligible projects. The language used in this subsection is taken directly from the statute.

Subsection C of TAM's amendment outlines two processes for obtaining support from the Authority. The first process is the Bona Fide Request (BFR) process. The concept for this process was taken from a successful program underway in Pennsylvania. The key factor here is that 50 people or 20% of an eligible area must commit to take service for a year if a service provider offers broadband service at affordable rates, here defined as no more than 150% of the statewide average for broadband service. This is designed to ensure that companies do not spend the resources to build out to a community only to find that no one in the community is willing to take the service, thus leaving stranded costs which must be absorbed by all of the provider's other ratepayers. The concept of "if you build it they will come" has been proven to be false based on actual take rates for service below 20% in most, if not all, areas in Maine. If, however, these 50 people, or 20% of the community whichever is less, submit a Bona Fide Request (BFR) to the Authority, then there is a clear indication that there is the potential for a return on investment within the community.

Upon receiving the BFR, the Authority forwards it to the existing communications service providers within the community. This is in keeping with the statutory mandate that the Authority determine that investment in the eligible area would not otherwise occur. The reason an existing carrier would take this opportunity to offer service in an area where they had not previously invested in sufficient infrastructure is quite simple: Either they invest or they wait for a competitor to come in to their territory and start taking their business. It is a method of spurring private investment in those areas where there is a demonstrable need. Furthermore, it assists the Authority and the State by prompting independent private investment that brings broadband service to unserved and underserved areas at virtually no cost to the Authority or the State. If a

company commits to providing service and fails to complete the activity within a year, then they will no longer be offered this right of first refusal in any area of the State where they operate. That lack of opportunity to head off a potential competitor in their territories will prove sufficient incentive for companies to complete upgrades in a timely fashion.

If, even with the customers expressing interest in taking service, none of the existing communications service providers are willing to take on the project on their own, the Authority will send the BFR to all communications providers and seek bids for providing service to the requesting area. The bids would include the rate per month for the first year, the area that can be covered by the bidder, and the time frame for completion of installation. The Authority then evaluates the bids based on a 60/20/20 formula for scoring, with the majority of the bidder scores being determined by price. The Authority awards the BFR area to the winning bidder and enters into an agreement through which, for the first 12 months after the proposed start date in the bid, the winning bidder charges customers the 150% of average rate and the Authority makes up the difference with the winning bidder. The reason the timing for payment by the Authority is phrased as being for the 12 months following the completion date set forth in the winning bid is to ensure timely completion of the build-out of the service. If a bidder says they will complete within 9 months of the award date, then the Authority starts paying for actual customers starting at that 9 month date. If the company runs over by 3 months, then they have 3 months where they have no customers and will not get compensated by the Authority. This places an incentive, but no direct penalty, on bidders to accurately estimate their completion date. So, for example, if the winning bidder proposed $65 per month and the 150% statewide average is $55, then the customers would each pay $55 per month and the authority would pay the winning bidder $10 per month per customer. If all 50 customers making the BFR take the service, that's $500 per month, or $6,000 for the 12 month period. After the 12 month period is up, the winning bidder must reduce their rate to the 150% of average rate and the Authority ceases to have any funding obligations.

Subsection C(2) deals with targeted projects. Targeted projects offer a means by which communications service providers propose projects which are not covered by the BFR process. This process is worded broadly to allow not just broadband providers to develop projects, but those wireless voice providers who have opted-in to ConnectME to propose projects as well. The criteria for a targeted project are designed to require the proposing company to commit to offering the service to at least 75% of the municipality encompassing the eligible area. This, combined with the obligation to offer services to residential and business customers alike, is designed to prevent "cherry picking" projects which would, for example, only target a downtown region or only businesses or only high volume users. As with the BFR process, existing providers are allowed a right of first refusal for providing sufficient communications services within one year. If no existing company exercises their right of first refusal, then the Authority must evaluate the proposed project and may fund up to $100,000 for the targeted project. However, in order to ensure that those entities proposing projects have sufficient private backing to make a long term commitment and sufficient resources to provide ongoing service, there is a one-to-one matching requirement. The Authority may only fund in an amount of $100,000 or whatever private funding the project developer is able to bring forward, whichever is less. So if a company proposes a $150,000 project, the company must come up with $75,000 on its own, at which point the Authority can match the $75,000 amount for a total project budget of $150,000.

By establishing this two track process, the Authority will be able to encourage private investment, while also encouraging new and innovative solutions for providing service in remote areas of the State. TAM's amendment will allow the Authority to maximize its effectiveness without unnecessarily spending ratepayer money to subsidize projects that may lack community support or private backing that will ensure long term viability.

Section 7. ConnectME Fund

TAM is concerned with the language in Section 7(B)(1) of the Rule, which states that "Assessments apply to all retail revenues derived from communications services billed to a location in Maine." This differs from the language of 35-A MRSA §9211(2), which states that assessments are collected on "revenue received or collected for all communications services provided in this State by the communications service provider." The limitation to retail service is expressly included in the statutory definition of communications services. However, once again, the drafters have attempted to amend the actual language of the statute. The collections are not for amounts billed to a location in Maine, they must be for all amounts received or collected for communications service provided in Maine. This has a number of implications. The first is that in the proposed Rule, a company could be liable for amounts billed that were never collected. This is a matter that was discussed in the development of the statutory language which, in fact, led to the statute being worded as it is with reference to amounts "received or collected" rather than amounts "billed". Secondly, there are situations in which a customer receives service in Maine but has a billing address outside of the State. As discussed above, where the statutory language is clear the Authority lacks the legal ability to "interpret" the statute in their Rules to say something other than what is in the statute. Accordingly, TAM would recommend replacing Section 7(B)(1) with the language contained in 35-A MRSA §9211(2).

Section 8. Waiver of Provisions of Chapter

TAM has no objection to this section.

Conclusion.

TAM believes that in all cases where the language of the Rule seeks to "clarify" the statute, the language of the statute must by law be retained. Moreover, there are significant structural issues with the proposed Rule which would defeat the whole purpose of incenting private investment in communications services in the State and instead replace the process with one which would seek to unnecessarily tax ratepayers to

develop projects which have not shown a potential for long term viability through an explicit cost-benefit analysis process. In addition, there are numerous areas where the proposed Rule seeks to defer to another day the defining of such items as the exact terms of the application process. This is a Rule. This is where those details ***must*** be established. Lack of precision leads to inappropriately vague standards that threatens the long term viability of what should be, and could be, a valuable tool for promoting advanced communications services throughout the State.

Accordingly, TAM would urge the Authority to adopt the changes proposed in these comments, including replacing the entirety of Section 6 of the Rule with the attached TAM Amendment to Section 6.

Dated at Augusta, Maine this 18th day of October, 2006.

Respectfully submitted,

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